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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 508

THE FLYING TIGER LINE, INC., PETITIONER

v.

CHARLES S. MURPHY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A. 1a) is not yet reported. The opinion of the district court is reported at 244 F. Supp. 889, and is reprinted in the Joint Appendix printed for the use of the court of appeals (J.A. 105–111).[1]

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1966. The petition for a writ of certiorari was filed on August 31, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Nine copies of this Joint Appendix have been filed with the Court. "J.A." citations refer to this document.

QUESTIONS PRESENTED

1. Whether the Federal Aviation Act authorizes the Civil Aeronautics Board to prescribe regulations restricting the passenger charter operations of all-cargo air carriers.

2. Whether the Civil Aeronautics Board's regulations governing such charter operations are reasonable.

3. Whether the Civil Aeronautics Board was required to hold an adjudicatory hearing prior to promulgating the challenged regulations.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Federal Aviation Act are set forth in Appendix B to the petition for certiorari. The relevant regulations are set forth in the appendix to this brief (*infra*, pp. 13–16).

STATEMENT

Under the Federal Aviation Act (49 U.S.C. 1301 *et seq.*), air carriers are prohibited from engaging in "any air transportation unless there is in force a certificate" of public convenience and necessity, or other authorization, issued by the Civil Aeronautics Board ("the Board") allowing the carrier to engage in such transportation (49 U.S.C. 1371(a)). The certificates of regular route carriers, such as petitioner, designate both the geographic points between which the carrier is authorized to fly and the type of service the carrier may provide. With respect to the type of service provisions, two broad categories have been recognized. Some certificates authorize the carriage of passengers, property and mail; holders of such certificates are called "combination carriers." Other certificates, held

by the so-called "all-cargo carriers," authorize the carriage of property and mail but not of passengers. The distinction between combination and all-cargo carriers has been recognized for regulatory purposes ever since the Board certified a group of carriers to serve as specialists in air-cargo service some twenty years ago.[2] Petitioner has been an all-cargo carrier under a certificate initially granted in 1949, renewed in 1956 and made permanent in 1962 (J.A. 44).

Under their certificates, both combination and all-cargo carriers can engage in both scheduled and charter flights between the points and of the type designated in their respective certificates. In addition, prior to 1962, Section 401(e) of the Federal Aviation Act,[3] authorized both types of carriers to "make charter trips * * * without regard to the points named in [their] certificate[s], under regulations prescribed by the Board." Thus, under Section 401(e), combination carriers could make charter combination flights, and all-cargo carriers, such as petitioner, could make charter cargo flights between points other than those designated in their respective certificates, subject to Board regulation. Section 401(e) did not, however, authorize all-cargo carriers to make charter passenger flights. See *Flying Tiger Line, Inc.* v. *Civil Aero-*

[2] *Air Freight Case*, 10 C.A.B. 572, affirmed *sub nom. American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417 (C.A.D.C.). The history of the all-cargo industry is traced in *Domestic Cargo-Mail Service Case*, 36 C.A.B. 344, 352–355.

[3] Section 401(e) of the Federal Aviation Act of 1958 reenacted without change the provisions of Section 401(f) of the Civil Aeronautics Act of 1938 (52 Stat. 987, 988–989).

nautics Board, 204 F. 2d 404 (C.A. D.C.).[4] Pursuant to its authority to regulate charter flights under Section 401(e), in 1951 the Board adopted a variety of regulations designed to limit the volume of the off-route chartering in which the combination and all-cargo carriers engaged (see 14 C.F.R. 207 (1952 rev.)) in order to encourage concentration on the development of service on the certificated routes. Most significantly, the Board limited each carrier's off-route charter flights under Section 401(e) in each calendar quarter to 2½ percent of the revenue plane miles flown in scheduled service during the preceding 12 months (see J.A. 16).

In 1962 Congress amended Section 401(e) of the Federal Aviation Act (76 Stat. 143) so as to permit carriers to engage in charter service "without regard to * * * the type of service" designated in their certificates as well as "without regard to the points named" in their certificates, subject to regulations prescribed by the Board.[5] As amended, Section 401(e)(6) (49 U.S.C. 1371(e)(6)) provides:

> Any air carrier, *other than a supplemental air carrier,* may perform charter trips or any other special service, without regard to the points named in its certificate, *or the type of service*

[4] Any passenger charters that were performed by all-cargo carriers, such as petitioner, were authorized by exemption order issued by the Board pursuant to Section 416(b). While the Board has given no indication that it intends to grant such exemptions as a matter of course, the present regulations do not preclude the issuance of exemption orders by the Board for passenger charters.

[5] See H. Conf. Rep. No. 1950, 87th Cong., 2d Sess. (S. 1969) pp. 12–13.

provided therein, under regulations prescribed by the Board. [New material in italics.]

In November 1962, in light of the amendment of Section 401(e), the Board instituted rule-making proceedings for the purpose of revising its regulations thereunder. The Board issued a notice of proposed rule-making and invited comment from the air carriers as to revision of the regulations (27 F.R. 11322); later, comments were solicited from the carriers on specific proposals for the revision of the regulations (29 F.R. 1476). The carriers were given the opportunity to present oral argument to the Board (29 F.R. 8121); and finally, on September 18, 1964, the Board adopted the present regulations (29 F.R. 13246; 14 C.F.R. § 207 (1966 rev.)) which petitioner challenges here.[6]

The revised Part 207 Regulations, like their predecessors, limit the volume of charter operations that a carrier can conduct under Section 401(e)(6); the regulations do not restrict charter flights conducted within the terms of a carrier's certificate—that is, between the points and of the type designated in its certificate. The regulations provide that, after January 1, 1965, neither a combination carrier (14 C.F.R. § 207.5) nor an all-cargo carrier (14 C.F.R. § 207.6)

[6] The Board issued a statement, when it promulgated the regulations, containing a lengthy and detailed explanation of the basis for, and purpose of, the revised regulations (J.A. 15–30). The Board noted that the primary function of certificated carriers was to serve their authorized routes with scheduled service and that restrictions had been adopted to restrain the carriers from placing undue emphasis upon charter operations thereby prejudicing their capacity to meet their obligation to provide adequate scheduled service (J.A. 17, 22).

may "during any calendar year perform off-route charter trips which in the aggregate, on a revenue plane-mile basis, exceed two percent of the base revenue plane miles flown by it during the preceding calendar year." As used here, the term "off-route charter trip" encompasses any charter trip for which authority is derived from Section 401(e)(6), rather than from a carrier's certificate, either because the trip is not between certificated points or not of the certificated type of service or both (14 C.F.R. § 207.6). Thus, a passenger charter by an all-cargo carrier is deemed "off-route" whether or not it is between points for which the carrier is certificated to provide cargo service. The restrictions do not apply to military charters, which, the Board noted, constituted "the great bulk" of the all-cargo carriers' charter operations (J.A. 23). Furthermore, each all-cargo carrier is exempted from the two percent limitation with respect to off-route cargo charters within its "area of operations"; petitioner's area of operations embraces the 48 contiguous States (14 C.F.R. § 207.6). Thus, the principal practical effect of the regulations, insofar as all-cargo carriers are concerned, is to limit civilian passenger charter service to two percent of certificated revenue miles.

Petitioner, the only all-cargo carrier whose civilian passenger charter operations exceeded the two percent limitation (see J.A. 23, n. 3), challenged the validity of Part 207 in the district court and sought injunctive and declaratory relief. The district court dismissed the complaint, holding that the Board had not exceeded its statutory authority, that the regulations

were not discriminatory, and that it was not necessary for the Board to conduct an adjudicatory proceeding prior to their adoption (J.A. 109–110). The court of appeals affirmed *per curiam* (Pet. App. A 1a).

ARGUMENT

1. Contrary to petitioner's suggestion that this litigation is of general importance to the air transport industry (Pet. 5, 20), the only members of the industry whose operations are immediately affected by the regulations are two combination carriers. (Trans Caribbean Airlines, Inc. and Mackey Airlines, Inc.) (J.A. 21), and petitioner (J.A. 23). And as to petitioner, whose certificate contemplates only the carriage of cargo, the effect is limited to one subsidiary aspect of its operation, *i.e.*, civilian passenger charter flights.[7] Thus, this case does not present an issue of general significance warranting review by this Court.

2. Furthermore, the issues raised in the petition lack merit. The very wording of Section 401(e)(6) indicates an intent to give the Board the authority to limit, by regulation, any charter service authorized

[7] Petitioner's prediction, in its amended complaint (filed October 20, 1964) (J.A. 11) and reiterated in its petition (Pet. 9, 20), that the two percent limitation would imperil its "economic survival in the immediate future," is not borne out by data filed with the Board. It appears from those data that, for the 12 months preceding the effective date of the new regulations (January 1, 1965) petitioner had operating revenues of $45,468,000, an operating profit of $4,005,000 and a return on total investment of 7.59 percent. For the 12 months following the effective date of the regulations petitioner enjoyed operating revenues of $56,156,000, an operating profit of $8,820,000, and a return on total investment of 10.71 percent. See Civil Aeronautics Board, *Air Carrier Financial Statistics*. Under 14 C.F.R. § 302.24(m), the Board takes official notice of these statistics.

by that section, and the legislative history of the 1962 amendment resolves any doubts as to the congressional purpose and intent. Prior to 1962 it was settled that all-cargo carriers, such as petitioner, were not authorized (except by special exemption granted by the Board) to engage in civilian passenger charter service.[8] The 1962 amendment is fully explained in the House conference report (H. Conf. Rep. No. 1950, 87th Cong., 2d Sess. (S. 1969), p. 13):

> This amendment will permit the Board to authorize cargo carriers to engage in passenger charter operations to the extent that it may find, from time to time, that the public interest so requires. * * * [T]he Board will have the necessary flexibility to limit *frequency of service* and to impose such other limitations, conditions, and restrictions as the public interest may require. [Emphasis added.]

The authority of the Board to restrict charter flights authorized under Section 401(e)(6) was thus retained by the 1962 amendment notwithstanding the Board's well established practice of restricting such operations to a percentage of scheduled operations (see, *supra*, p. 4). There is, therefore, no reason to suppose that Congress did not anticipate the promulgation of the very type of regulations that the Board has adopted.

3. Petitioner's contention, that the Board's regulations discriminate against the all-cargo carriers in favor of the combination carrier, is also without merit. The regulations provide the same two percent limita-

[8] *Flying Tiger Line, Inc.* v. *Civil Aeronautics Board*, 204 F. 2d 404 (C.A. D.C.).

tion for combination carriers as for all-cargo carriers. Compare 14 C.F.R. 207.5(b) with 14 C.F.R. 207.6(b).

Petitioner contends, however, that the regulations discriminate by permitting the combination carriers to engage in passenger charters over their certificated routes, without limitation, while restricting passenger charters by all-cargo carriers over their certificated routes (Pet. 13–14). The complete answer to this contention is that the combination carriers' authority to provide on-route passenger charters comes from the carriers' certificates, issued pursuant to Section 401 (d)(1), and not from Section 401(e)(6), which is limited to providing authority for charters beyond the scope of a carrier's certificate (H. Conf. Rep. No. 1950, 87th Cong., 2d Sess. (S. 1969), p. 12; 108 Cong. Rec. 12318). Thus, the authority of combination carriers to engage in passenger charters between the cities they serve is based upon their certificates to engage in regular passenger service, just as the all-cargo carriers may engage in unrestricted cargo charter service between the cities they serve. The difference in authority to operate such "on-route" charters is based upon the fundamental difference in the certificates between combination and all-cargo carriers.[9]

[9] Petitioner points out (Pet. 17–18) that, subsequent to passage of the 1962 amendment, Senator Engle of California, a Conference Committee member, in the proceedings which led to the regulations in dispute here, disputed the existence of a distinction in Section 401(e)(6) between off-route and on-route charters (J.A. 69–74). While we strongly doubt the probativeness of such post-enactment legislative "history," we note that Senator Cotton of New Hampshire, another member of the Conference Committee, in a letter to the Board, reaffirmed the existence of that distinction (J.A. 103–104).

4. Petitioner also contends that the regulations are invalid because the Board did not hold an adjudicatory proceeding to establish the need for the two percent limit (Pet. 22–26).[10] But the regulations objected to are clearly within the normal scope of agency rule-making. They were adopted after protracted proceedings in which all interested parties were invited to participate, they are general in application and prescriptive in character. The reasons for their adoption, spelled out in the Board's memorandum (J.A. 15–30), relate to the future growth and development of the industry. It is well settled that general rules or regulations of this kind, though they may adversely affect members of a regulated industry, need not be preceded by an adjudicatory proceeding or supported by an evidentiary record. See, *e.g.*, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202–204; *Federal Power Commission* v. *Texaco*, 377 U.S. 33, 39–45; 2 Davis, *Administrative Law*, § 15.03, p. 353. See also *National Broadcasting Co.* v. *United States*, 319 U.S. 190.[11]

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[10] A similar contention was presented and rejected in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F. 2d 624 (C.A.D.C.), certiorari denied, October 10, 1966 (No. 304, this Term).

[11] In urging that an evidentiary record was needed to support the two percent off-route charter limitation, petitioner relies heavily on *American Trucking Associations* v. *United States*, 344 U.S. 298 (Pet. 22–24). Such reliance is misplaced. To be sure, evidentiary hearings were held by the Interstate Commerce Commission prior to its adoption of the challenged regulations, and this Court did rely on evidence adduced at those hearings in demonstrating that the regulations had a rational basis. But this Court specifically noted that the agency was not required to hold evidentiary hearings: 344

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
BAREFOOT SANDERS
Assistant Attorney General.
DAVID L. ROSE,
HARVEY L. ZUCKMAN,
Attorneys.

JOSEPH B. GOLDMAN,
General Counsel,
Civil Aeronautics Board.

OCTOBER 1966.

U.S. at 320. The Court did not indicate in any way that, had such hearings not been held, it would have declared the regulations invalid.

APPENDIX

Part 207 of the Civil Aeronautics Board Regulations, 14 C.F.R. 207 (1966 rev.), provides in pertinent part:

§ 207.1 Definitions.

* * * * *

"All-cargo carrier" means an air carrier holding a certificate of public convenience and necessity issued pursuant to section 401(d) (1) or (2), which authorizes the carriage of property only or property and mail only.

* * * * *

"Charter trip" means air transportation performed by an air carrier holding a certificate of public convenience and necessity where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage or for the movement of property, on a time, mileage or trip basis:

(1) By a person for his own use,

(2) By a person (no part of whose business is the formation of groups for transportation or the solicitation or sale of transportation services) for the transportation of a group of persons as agent or representative of such group,

(3) By two or more persons acting jointly for the transportation of such group of persons, or their property,

(4) By an air freight forwarder holding a currently effective letter of registration issued under Part 296 or Part 297 of this subchapter for the carriage of property in air transportation.

* * * * *

"Combination carrier" means an air carrier holding a certificate of public convenience and necessity issued pursuant to section 401(d) (1) or (2) which authorizes the carriage of persons, property and mail or persons and property only.

* * * * *

"On-route" shall refer to service performed by an air carrier between points between which said carrier is authorized to provide service pursuant to either its certificate of public convenience and necessity or exemption authority: *Provided, however,* That passenger charter trips by any all-cargo carrier are not considered to be on-route whether or not they are performed between points designated to receive service by such carrier in its certificate of public convenience and necessity, except that in the event services are performed pursuant to a contract with the Department of Defense *or* an agency thereof, by an all-cargo carrier between points designated to receive service by such carrier in its certificate of public convenience and necessity which (1) involves cargo transportation in one direction and passenger transportation in the other direction or (2) involves a mixed charter, the passenger charter leg or the mileage operated in the mixed charter, as the case may be, will be considered on-route. "Off-route" shall refer to any charter except those performed for the Department of Defense which is not on-route.

* * * * *

§ 207.5 Limitation on amount of charter trips which may be performed by combination carriers.

(a) Prior to January 1, 1965, a combination carrier shall not during any calendar quarter perform off-route charters which in the aggregate, on a revenue plane-mile basis, exceed 2½ percent of the revenue plane miles flown by it in scheduled air transportation during the preceding 12-month period.

(b) Effective January 1, 1965, a combination carrier shall not during any calendar year perform off-route charter trips which in the aggregate, on a revenue plane-mile basis, exceed two percent of the base revenue plane miles flown by it during the preceding calendar year.

§ 207.6 All-cargo carriers; limitation on amount of charter trips which may be performed.

(a) Prior to January 1, 1965, an all-cargo carrier shall not during any calendar quarter perform off-route charters which in the aggregate, on a revenue plane-mile basis, exceed 2½ percent of the revenue plane miles flown by it in scheduled air transportation during the preceding 12-month period: *Provided, however,* That an all-cargo carrier shall be permitted to perform off-route cargo charters within its area of operations without any limitation as to volume of service.

(b) Effective January 1, 1965, an all-cargo carrier shall not during any calendar year perform off-route charters which in the aggregate, on a revenue plane-mile basis, exceed two percent of the base revenue plane miles flown by it during the preceding calendar year: *Provided, however,* That an all-cargo carrier shall be permitted to perform off-route cargo charters within its area of operations without any limitation as to volume of service.

(c) Within the meaning of paragraphs (a) and (b) of this section, the areas of operations of the all-cargo carriers are the following:

(1) Within the 48 contiguous States—Slick Airways, Inc.; Flying Tiger Line, Inc.; and Airlift International, Inc.

(2) Between the 48 contiguous States and Europe—Seaboard World Airlines, Inc.

(3) Between the 48 contiguous States and Puerto Rico—Airlift International, Inc.

(4) Between the 48 contiguous States on the one hand and the Caribbean, Central and South America on the other hand—Aerovias Sud Americana, Inc.

U.S. GOVERNMENT PRINTING OFFICE: 1966